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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1968

No. 158

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION, ET AL.,
Petitioners,

vs.

JOHN P. O'CONNELL, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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QUESTION PRESENTED.

Whether Section 2, Eleventh (c) of the Railway Labor Act, 45 U. S. C. 152, Eleventh (c), should be construed literally so that full effect is given to its clear and unambiguous language providing that membership of an operating employee in any labor organization national in scope satisfies the membership requirement of any collective bargaining agreement applicable to operating employees.

STATEMENT OF THE CASE.

For many years prior to the merger of the Delaware, Lackawanna & Western R. R. Co. and the Erie Railroad in October, 1960, the Switchmen's Union had represented the craft or class of yard foremen, helpers and switchtenders employed by the Delaware, Lackawanna & Western R. R. Co. while the Brotherhood of Railroad Trainmen represented these crafts and classes on the Erie R. R. Co.

Following the enactment of the Union Shop Amendment to the Railway Labor Act in 1951, and at all times thereafter until the merger, the Switchmen's Union and the Trainmen each maintained union shop agreements with the respective railroads on which they held bargaining rights, including both the Lackawanna and the Erie, which by their express language, and by their uniform application, permitted membership in either the Switchmen's Union, the Order of Railway Conductors or the Trainmen to satisfy the union shop requirements.

The Trainmen won bargaining rights for all yard service employees on the merged railroads by a close election in which the Trainmen received 43 more votes than the Switchmen out of a total vote of 1943. Thereafter the Trainmen and the Erie Lackawanna Railroad Company maintained union shop agreements which from 1960 until March 14, 1967 contained express language, and were construed and applied, to permit satisfaction of the membership requirement by membership in either the Switchmen's Union or in the Order of Railway Conductors. More than 500 employees within the craft or class continued at all times to be members of the Switchmen's Union and did not join or maintain membership in the Trainmen. Similarly more than 225 continued as members of the Order of Railway Conductors instead of the Trainmen.

On March 14, 1967 the Erie Lackawanna Railroad and the Trainmen entered into a new union shop agreement which omitted the language permitting alternate union membership and imposed instead an absolute requirement of membership in the Trainmen, applicable to the former D L & W District. On April 4, 1967 a similar change was made in the union shop agreement between the railroad and the Trainmen applicable to the Erie District.

This suit for injunction, declaratory judgment and damages was filed by three yard service employees and four conductors of the Erie Lackawanna Railroad Company on behalf of themselves and all other members of the Switchmen's Union and all other members of the Order of Railway Conductors who are employed by the railroad. The complaint named the Erie Lackawanna Railroad Company and the Trainmen as defendants and alleged that the railroad had entered into union shop contracts which violate Section 2, Third, Fourth, Fifth and Eleventh of the Railway Labor Act, 45 U. S. C. 152.

Judge Herlands entered a preliminary injunction restraining the railroad and the Trainmen from giving effect to the contracts. Judge Herlands wrote a carefully documented opinion which is printed in Appendix A to the petition, pages 1a-13a, in which he reviewed the legislative history of Section 2, Eleventh (c) of the Railway Labor Act and concluded that Congress intended its language to be applied literally. Judge Herlands stated (Pet., pp. 18a-19a):

> "* * * whatever may be the advantages or disadvantages of other approaches to the problem of intercraft mobility, the means provided by the literal terms of Section 2, Eleventh (c) accomodates the needs of the operating crafts without promoting internal warfare between unions. Moreover, the provision—literally construed—reconciles the problem of intercraft mobility with the primary policy underlying the 1951 amend-

> ments to allow for an equitable sharing of the cost of representation. For, by limiting alternative membership to those unions which qualify as electors to the First Division of the National Railroad Adjustment Board, membership may be confined to those unions which share the costs of administration of the NRAB, and join together in other respects in negotiating and policing collective bargaining agreements." (Footnotes omitted.)

Upon counter motions for summary judgment, Judge Palmieri entered judgment for the plaintiffs declaring that the contracts of March 14 and April 4, 1967 violate Section 2, Third, Fourth, Fifth and Eleventh of the Railway Labor Act and enjoining the railroad from discharging or threatening to discharge, and the Trainmen from causing or attempting to cause the discharge of, any employee of the Erie Lackawanna Railroad Company for failure to join or maintain membership in the Brotherhood of Railroad Trainmen so long as he maintains membership in the Switchmen's Union or in the Order of Railway Conductors.

Judge Palmieri wrote an opinion, which is printed in Appendix B to the petition, pp. 20a-25a, which in effect adopted Judge Herlands' opinion.

The Court of Appeals affirmed with an opinion, printed in Appendix C to the petition, pp. 26a-44a, in which it analyzed the legislative history and concluded (Pet., p. 29a):

> "We agree with Judge Herlands that there is no compelling indication of legislative intent contrary to the clear words of the statute, nor are the results of construing the words as they were written so absurd as to require the strained construction for which appellant contends. We affirm."

ARGUMENT.

I.

THE DECISION BELOW IS CLEARLY CORRECT.

The language of Section 2, Eleventh (e) of the Railway Labor Act is precise and unambiguous. In pertinent part it provides:

> "The requirement of membership in a labor organization * * * shall be satisfied, as to both a present or future employee in * * * yard service * * * if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter, and admitting to membership employees of a craft or class in any of said services; * * * *Provided, however,* that as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft in class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* that nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services."

There could hardly be a more explicit statement that the only instance in which a union representing yard service employees can require an employee to join that union, as opposed to one of the other unions national in scope rep-

resenting operating employees, is when that employee is not a member of any such union, on the effective date of the agreement. In that event, and only in that event, may an employee be required to join the contracting union. This is expressly provided by the next to the last proviso clause in Section 2, Eleventh (c).

And even such an employee, as well as any other employee, may thereafter at any time change his membership to any other union national in scope and admitting to membership operating employees, without thereby putting himself out of compliance with the membership requirements of a valid union shop agreement. This is expressly provided in the last proviso to Section 2, Eleventh (c). This Court in *Felter* v. *Southern Pacific Co.*, 359 U. S. 326, 336-337 (1959) relied upon this last proviso as establishing "the area that the Act leaves open for solicitation by rival organizations" and "the area where even a worker under a union-shop arrangement can change affiliations."

The construction which the petitioners seek to place on Section 2, Eleventh (c), not only lacks any support in the language or structure of the statute or its legislative history, but in addition is completely negated by the last proviso. Petitioners would construe Section 2, Eleventh (c) to protect only an employee who changed crafts from having to change his union. Petitioner's analysis leaves no situation in which an employee could change from membership in the union representing the craft in which he was employed. But Congress expressly gave each operating employee the right to leave the union representing the craft in which he was employed and join another without violating any union shop which Congress permitted to be made. This does not involve keeping membership despite a shift in craft but a change of the opposite sort.

The effect of Section 2, Eleventh (c) is to treat all members of organizations participating on the First Division

of the National Railroad Adjustment Board as a pool for purposes of all union shop agreements permissible for operating employees. This Court has construed the phrase "national in scope" in Section 2, Eleventh (c) as defining those labor organizations in which alternate union membership is permissible as those labor organization which participate in selecting members to serve on the First Division of the National Railroad Adjustment Board. *Pennsylvania Railroad* v. *Rychlik*, 352 U. S. 480, 485 (1957).

In *Rychlik* (352 U. S. at pp. 494-495), this Court observed that these labor organizations participating in the selection of members of the NRAB were "a group already constituted." This group consists of the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors, the Brotherhood of Railroad Trainmen, a petitioner herein, and the Switchmen's Union, a respondent herein.

As the legislative history set forth in the Court of Appeals' opinion below (Pet., pp. 33a-36a) shows, it was this group of unions which opposed the enactment of a union shop statute applicable to them unless the statute limited the type of union shop permissible so that the membership requirement could be satisfied by membership in any one of them. The Brotherhood of Railroad Trainmen did make an effort to get Congress to adopt the modified form of union shop which it now espouses in its petition, in which the right to alternate membership would be limited to a retention of membership in a labor organization representing the craft or class in which the employee worked prior to an intercraft transfer of working assignment. Congress rejected the Trainmen's proposal. Thus, the construction which the Trainmen seek to have placed on Section 2, Eleventh (c), not only conflicts with that section's express language but also would require a judicial adjudication that Congress accepted what Congress in fact rejected.

The legislative history, which in this regard is also fully set forth in the Court of Appeals' opinion (Pet., pp. 35a-36a), shows that three operating unions, including the Brotherhood of Railroad Trainmen, drafted the present language of Section 2, Eleventh (c), agreed to this language and presented it to Congress as the language which these three operating unions desired adopted by Congress. Thereupon, Congress adopted the proposed language as Section 2, Eleventh (c). And as the quotations from the Congressional Record set forth in the Court of Appeals' opinion (Pet., pp. 36a-37a) show, Senators and Congressmen understood that Section 2, Eleventh (c) in the form in which they were adopting it, permitted any operating employee complete freedom not to belong to the contracting union so long as he belonged to any one of the operating unions which participated in the National Railroad Adjustment Board, First Division.

All operating unions, including the petitioner Brotherhood of Railroad Trainmen, and all carriers, for more than 15 years, understood and applied Section 2, Eleventh (c) literally. Not until the Trainmen and the Chicago Milwaukee, St. Paul & Pacific Ry. Co. on February 1, 1967 entered into the union shop agreement held invalid by the United States Court of Appeals for the Seventh Circuit in *Birkholz* v. *Dirks*, 391 F. 2d 289, petition for certiorari pending, No. 172, O. T. 1968, did any operating union or any carrier attempt to limit the right of any operating employee to belong to any of the standard operating unions. The Seventh Circuit in that case relied upon this uniform application of Section 2, Eleventh (c), stating (391 F. 2d at p. 293):

> "We also consider the contemporaneous interpretation of this Section by the operating craft brotherhoods significant in determining its proper interpretation, since they themselves drafted the Section to meet

their own needs. It is undisputed that for fifteen years after the passage of the Act all union shop agreements entered into by standard operating unions, including the Trainmen, contained the exact literal language of Sec. 2 Eleventh (c) and that that language was interpreted to permit alternate membership in any standard operating craft union. The Trainmen's position would suggest that the drafters of 2 Eleventh (c), including itself, did not know what the Section meant and have been misapplying it for fifteen years. This position is inherently unpersuasive especially when it is recognized that the interpretation now urged would change the law to conform to the proposal which the Trainmen unsuccessfully advocated before Congress at the time the Section was enacted."

The form of union shop prescribed by the literal language of Section 2, Eleventh (c) eliminated the problem of the "free rider" without upsetting "the balance of union power which existed under the prevalent practice of having substantial enclaves of minority union members existing in the jurisdiction represented by the majority union" (Judge Herlands' opinion, Pet., p. 13a). These five unions share the costs of bargaining for operating employees, the major portion of which takes place on a national basis, in which all or several of these five unions join in negotiating collective bargaining agreements and in their interpretation by the National Railroad Adjustment Board, First Division. Each of the five maintains a member on the National Railroad Adjustment Board. All participate in many major national negotiations, presentations to National Emergency Boards and to arbitrators or in other aspects of collective bargaining. E.g., 17th Annual Report of N. M. B. for Fiscal Year Ended June 30, 1951, pp. 7-8; 26th Annual Report, p. 16; 27th Annual Report, p. 17; 28th Annual Report, p. 14; 29th Annual Report, pp. 14-15; 30th Annual Report, pp. 15-18; Jacob J. Kaufman, Collective Bargaining in the Railroad Industry (Columbia Univ.

1954), pp. 46-50. Requiring membership in one of these unions assures participation by all employees in bearing the costs of bargaining. Treating the members of the five unions as a pool for union shop purposes follows logically from the pooling by these unions of a substantial part of the costs of collective bargaining.

Tolerance for the existence of substantial enclaves of minority union membership is dictated by intercraft flow of employment not generally present in non-railroad industry. The ebb and flow of firemen to and from engineer's jobs, of engineers to and from firemen's jobs, of trainmen to and from conductor's jobs, of conductors to and from trainmen's jobs, of yard service employes to and from road service jobs, and of road service employes to and from yard service jobs, often results in the change of a majority union to a minority union due in whole or major part to changes in level of railroad employment rather than union recruiting. Any attempt to have legislated traditional union shop practices for this situation would have resulted in major changes in union relationships which neither the unions themselves nor Congress wished to disturb.

The decision below is in accord with the only other decision on the same issue, namely the decision of the United States Court of Appeals for the Seventh Circuit in *Birkholz* v. *Dirks*, 391 F. 2d 289, petition for certiorari pending, No. 172, O. T., 1968.

The petition for a writ of certiorari should be denied because the decision below is correct and presents no issue warranting review by this Court in view of the present state of the decisional law.

II.

THERE ARE NO CONFLICTING DECISIONS.

The petition (p. 5) claims a direct conflict with *Rohrer* v. *Conemaugh & Black Lick R. R. Co.*, 359 F. 2d 127 (3rd Cir. 1966). That case did not present, and the court did not rule on, the issue here presented. There the contracting union, the United Steel Workers Union, represented an industrial unit, not a craft unit. The Third Circuit, at page 128 of its opinion, recites that "the National Mediation Board had certified the Union as the bargaining representative of all the employees of the Railroad regardless of their class or craft." Conemaugh & Black Lick Railroad Co. is a wholly owned and consolidated subsidiary of the Bethlehem Steel Company. All of its employees were represented by the United Steel Workers Union, Conemaugh & Black Lick was organized and functioned as an industrial operation rather than as a railroad. The provisions of Section 2, Eleventh (c) are by their terms only applicable to situations where employees are organized and the union certified on the basis of crafts or classes limited to operating employees, namely, the "engine, train, yard or hostling service."

Judge Herlands in issuing the preliminary injunction in the instant case held the factual situation in *Rohrer* to be "clearly distinguishable from the one now before this Court" (Pet., p. 16a). Judge Herlands pointed out that the Steelworkers union "has never qualified as an elector to the First Division—or any other division—of the National Railroad Adjustment Board" and the case "therefore, presents a special situation which properly should be limited to its particular facts." (Pet., p. 16a).

No other conflict is claimed and we know of none.

III.

THE DECISION BELOW IS CONSISTENT WITH A COHERENT NATIONAL LABOR POLICY.

The petition (p. 5) asserts as a reason for granting the writ, that "the philosophy expressed by the interpretation is at war with a coherent national labor policy, not only for industry generally, but for the balance of the railroad industry as well." But there is no magic in a strict union shop which requires its application to all employees. The congressional innovation, at the request of all unions involved, of a more expansive union shop than the traditional one deserves the sympathetic treatment which it received in the courts below. Indeed Judge Herlands expressed the view that "the explicit means delineated by Section 2, Eleventh (c) is the soundest approach to the problem of intercraft mobility" (Pet., p. 12a) for "the means provided by the literal terms of Section 2, Eleventh (c) accommodates the needs of the employees in the operating crafts without promoting internal warfare between unions" (Pet., pp. 13a-14a).

None of the vices which petitioners (Pet., pp. 5-8) ascribe to a literal interpretation are in fact present. As we have already shown, the extent of sharing of costs by all five unions electors to the National Railroad Adjustment Board, First Division, not only with respect to that Board but with respect to their numerous other cooperative projects, shows that the requirement of membership in one of them eliminates the free rider.

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari should be denied.

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